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RHYTHMS
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Kimberly Scardino
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9 November 2000

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20054

Re: CC Docket No. 00-176

Dear Ms. Salas:

On Friday, November 3, 2000, the Massachusetts Department of Telecommunications and Energy (DTE) filed its reply comments with the Commission in the above-referenced docket. Covad Communications Company (Covad) and Rhythms NetConnections Inc. (Rhythms) are extremely concerned about several of the statements made by the DTE in those comments. The comments suggest that, in the DTE's view, the burden was on Covad and Rhythms to *disprove* Verizon's compliance with the competitive checklist of section 271¹, rather than on Verizon to affirmatively prove its

¹ See, e.g., DTE Reply Comments at 66 ("That Covad, by its own (in)action, chose not to pursue a VZ-MA argument is not a reflection on the Department's process but, rather, indicates a conscious decision by Covad."); *Id.* at 68 ("Covad cannot legitimately argue that it was denied an opportunity to investigate VZ-MA's performance."); *Id.* at 66 ("Like any other participant, Covad was given a meaningful opportunity to challenge VZ-MA's assertions or to substantiate Covad's claims about VZ-MA's performance by providing its own data."); *Id.* at 67 ("For a significant number of claims Covad made throughout our proceeding, it was unable to produce any supporting data."); *Id.* at 66 n. 212 ("Covad did not challenge VZ-MA's accounting of Covad's data nor did it ever seek to 'reconcile' its claims with VZ-MA's responses."); *Id.* at 67. ("We note that, unlike other participants, Covad chose not to propound any discovery on VZ-MA's May 2000 filing."); *Id.* at 68 ("Nor should Covad fault the Department for its own inaction during the VZ-MA § 271 investigation."); *Id.* at 72 ("Rhythms, too, failed to raise the issue of CLEC-specific information before the Department."); *Id.* at 82 ("Rhythms did not challenge VZ-MA's assertions regarding lack of CLEC cooperative testing during our § 271 investigation.").

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compliance with that checklist.² The DTE's reply comments – statutorily entitled to no more weight than the comments of Covad and Rhythms -- are, sadly, rife with misstatements, mischaracterizations of the record, and erroneous conclusions of law. Covad and Rhythms therefore respectfully submit this *ex parte* letter to highlight some key errors in the DTE's reply comments. These clarifications are particularly important, given that the DTE's comments offer the most consistent and vocal support for Verizon's application of any commenter in this proceeding.

A recurring theme throughout its reply comments is the DTE's contention that Covad and Rhythms failed to raise particular issues before the DTE, and thus their contentions can be ignored. Setting aside the issue of which party has the burden of proving checklist compliance (which raises the question why the DTE devoted no part of its reply comments to addressing Verizon's affirmative proof of checklist compliance), the DTE is flat wrong that Covad and Rhythms failed to raise such issues.

Third Party Testing: Inexplicably, the Department contends that all of Covad's comments on the invalidity of the KPMG test are to be ignored, because "Covad neglected to raise its concerns about KPMG's evaluation process until well after KPMG had completed its observations of VZ-MA's xDSL provisioning process."³ Incredibly, the DTE ignores the extensive comments, filed by Covad with the DTE on October 15, 1999 (well before the KPMG test) objecting to KPMG's Master OSS Test plan because it failed to include DSL and linesharing testing. In particular, Covad asked the DTE to implement the performance metrics that the NY PSC had put in place, and to include in its review subsequent metrics (such as linesharing) that were then under consideration by the NY PSC.⁴ It is thus difficult to see how the DTE could argue that "[t]he FCC should reject Covad's unwarranted and untimely criticism of KPMG's testing methodology."⁵

The DTE concedes that "KPMG did not replicate VZ-MA's xDSL metrics on a disaggregated basis," but then argues that KPMG's failure to test Verizon's DSL metrics was irrelevant, because it included Verizon's overall performance in its "aggregate UNE-Loop metrics replication."⁶ Yet, as the Department of Justice concluded, "[a]lthough KPMG reviewed other Verizon performance metrics, it did not test the DSL metrics because they were implemented by Verizon after the initial testing period."⁷ That conclusion, statutorily afforded "substantial weight" in contrast with the DTE's comments, clearly supports Covad and Rhythms' contention that KPMG did not test DSL metrics. KPMG simply could not have – and for the DTE to suggest that KPMG exercised some temporal anomaly to test Verizon's DSL performance is a misrepresentation of the record.

² Cf. *Bell Atlantic New York 271 Order* at para. 47 ("At the outset, we reemphasize that the BOC applicant retains at all times the ultimate burden of proof that its application satisfies all of the requirements of section 271, even if no party files comments challenging its compliance with a particular requirement.").

³ DTE Comments at 24.

⁴ Covad KPMG Master OSS Test Plans Comments at 3.

⁵ DTE Comments at 24.

⁶ DTE Reply Comments at 22.

⁷ DOJ Evaluation at 15 citing to Rhythms Comments at 29-30 (quoting KPMG statements at DTE Technical Conference ("... we did not test the xDSL metrics....")).

The inclusion of “xDSL orders . . . in KPMG’s aggregate UNE-Loop metrics”⁸ completely ignores the level of DSL proof the Commission has required in BOC 271 orders. In particular, as far back as the *Bell Atlantic New York 271 Order*, the Commission held that, as to the loops checklist item, “we do not expect to rely solely on a BOC’s overall loop performance in reaching a decision on this checklist item in future applications. Rather, we will find it most persuasive if future applicants under section 271, unlike this applicant, make a separate and comprehensive evidentiary showing with respect to the provision of xDSL-capable loops, either through proof of a fully operational separate advanced services affiliate as described below, which may also include appropriate performance measures, or through a showing of nondiscrimination in accordance with the guidance provided herein.”⁹ The DTE could have required such a showing by Verizon in Massachusetts, but it failed to do so¹⁰, over the objections of Covad and Rhythms.

The DTE also concedes that KPMG did not test Verizon’s linesharing capabilities, but contends that such an omission does not cause “KPMG’s test to have any less significance.”¹¹ In addition, the DTE explains that “logistical constraints” prevented KPMG from testing linesharing UNEs because KPMG’s testing protocols “do not allow for constant changing of the test parameters.”¹² In sum, it would have been too difficult for KPMG to test Verizon’s linesharing UNE capabilities because of “logistical constraints” in the timing of the test – despite the fact that the Commission’s order requiring linesharing as a UNE was adopted in November of 1999.

Immediately after the KPMG Technical Session in MA,, Covad and Rhythms filed a motion for reconsideration with the DTE, pointing out that KPMG had not tested linesharing and had failed to test and validate the existing DSL metrics and data.¹³ The DTE never acted on Covad and Rhythms’ motion. This Commission, fortunately, is not bound by the DTE’s lapse in oversight, and should reject Verizon’s application based on

⁸ DTE Comments at 22.

⁹ *Bell Atlantic New York 271 Order* at para. 330.

¹⁰ It is difficult for Rhythms and Covad to understand the DTE’s statement that it “replicated a total of 23 metrics, and our result matched VZ-MA’s reported performance in all but four instances . . .” DTE Comments at 22. The DTE’s purported reconciliation never involved Covad or Rhythms, so it must have simply verified Verizon’s math in each metric, rather than verify the actual underlying data to see if it properly captured all DSL orders in the proper timeframe. The former is a pedantic exercise; the latter would have provided actual insight into the validity of Verizon’s metrics. Had DSL metrics been included in the third party test, KPMG would have performed a Data Integrity Investigation to determine whether the appropriate data were being used in the calculations of the BA-MA xDSL metrics. *See KPMG Final Report* at 614.

¹¹ DTE Comments at 23.

¹² *Id.* at 24.

¹³ Motion of Rhythms and Covad to Request that the Department of Telecommunications and Energy Order KPMG to Perform Additional DSL Testing, dated September 1, 2000 (“Without this additional testing, the record that the FCC will rely on in making its 271 assessment will not accurately reflect Verizon-MA’s DSL and line sharing performance—issues that the FCC has indicated will be closely scrutinized in future applications.” (p. 2)).

its failure to provide DSL loop and linesharing data independently verified by a third-party tester.

Examination of Verizon's xDSL Data: The DTE also contends that Covad and Rhythms failed to cross-examine any Verizon witnesses on the specific issues of loop checklist compliance or the validity of the performance metrics, and thus the two parties' opposition is to be ignored. At the hearing held on August 17, 2000, at which Verizon witnesses were cross-examined on the subject of the performance data and metrics, the parties attempted to cross-examine Verizon on those subjects – and were stifled in their efforts by the Commissioner Chair himself. At that hearing, Rhythms attempted to examine Verizon witnesses on the validity of the performance metrics and the data reported by Verizon. As the transcript of the hearing attests, Chairman Connelly silenced the efforts of counsel for Rhythms to question Verizon witnesses John White and Beth Abesamis on the metrics and performance data:

CHAIRMAN CONNELLY: Excuse me. You're just asking the witness to confirm data point after data point, which is something that's already on paper before us. Are you going somewhere with this?

MS. SCARDINO: Yes. I believe I'm establishing that the statement in Paragraph 99 of the measurements affidavit, where Bell Atlantic states that their carrier-to-carrier results specifically undermine CLECs' claims that they're receiving nondiscriminatory access to DSL service –

CHAIRMAN CONNELLY: Isn't that something you can deal with on final argument, rather than step us through page by page?

Tr. at 4339-40.

Thus, the DTE specifically instructed Covad and Rhythms to address performance data and metric issues on final argument (for which each carrier was given only a matter of a few minutes to present all its objections orally to the DTE), rather than by cross examining the Verizon witnesses.¹⁴ The DTE's claim in its reply comments that "Covad cannot legitimately argue that it was denied an opportunity to investigate VZ-MA's performance" is itself illegitimate.¹⁵

The DTE contends instead that support for the validity of Verizon's performance data and metrics is to be found in the DTE's own replications of 23 of Verizon's

¹⁴ On final argument, Covad and Rhythms raised concerns with Verizon's reported performance data on xDSL. See Tr. at 5493-5510 (Covad: "Verizon's own performance shows poor performance on DSL Loops. Verizon's performance for itself is improving, while performance for CLECs remains out of parity."; *Id.* at 5570-5582 (Rhythms: "Where the data shows poor performance, Verizon attempts to distinguish it by pointing out every instance whereby a CLEC's behavior could have skewed the performance data. This Department should not accept such excuses. Verizon created the definitions for those metrics and now, on the eve of filing its application with the FCC, attempts to discredit the calculation.")).

¹⁵ DTE Reply Comments at 62.

performance metrics.¹⁶ What the DTE should have done is looked at the raw data that Verizon used to compile its metrics. In that way, the DTE would have examined whether Verizon was including all DSL loop orders, whether the orders it was excluding were properly excluded pursuant to the metrics' business rules, and whether Verizon was properly calculating intervals based on the receipt of orders, maintenance requests, and the like. What the DTE did instead is simply accept Verizon's word at face value that it had done all of the data gathering and exclusion properly, and the DTE simply checked Verizon's math.

CLEC Specific Performance Reports: The DTE next claims to be "unaware that th[e] lack of CLEC-specific data posed a hindrance to Covad because Covad never raised this issue during our proceeding."¹⁷ The DTE brushes off Rhythms in the same manner.¹⁸ The DTE apparently contends that it was unaware that Verizon provided CLEC-specific data in New York. More amazingly, the DTE appears to contend that the only reason it never ordered Verizon to provide CLEC-specific data to carriers was because Covad did not request it. This despite the DTE's concession that AT&T requested CLEC-specific information, thus presenting the disaggregation issue squarely on the record.¹⁹ But the greatest DTE misconception of the competitive reality in Massachusetts is the statement that Covad and Rhythms do not receive carrier-specific data because they "have chosen not to opt-in to the Consolidated Arbitrations performance standards."²⁰ The DTE must know that the consolidated arbitration was developed before either Rhythms or Covad were operational in Massachusetts, and that the arbitration data contains *absolutely no* DSL-specific data. Even if Rhythms and Covad decided to participate in the consolidated arbitrations, there is no DSL data to be had.

On-Time Performance: Next the DTE notes that "[w]hile Covad makes much of one provisioning metric, PR 3-10, we find it significant that it does not dispute VZ-MA's assertion that Covad receives loops by the Covad-requested due date."²¹ First of all, PR 3-10 is the measure of whether Covad receives loops on-time within the standard six day interval. By making "much" out of PR 3-10, Covad is expressly contending that Verizon's on-time loop delivery interval of 51% in July 2000 demonstrates failure to comply with the checklist. Second, the DTE's contention that Covad does not dispute Verizon's assertion that it provides loops when Covad requests them highlights a DTE misreading of the record. As discussed in detail in Covad's November 7, 2000, *ex parte* letter to the FCC, Verizon's contention that its confirmed due date meets the CLEC

¹⁶ DTE Reply Comments at 22.

¹⁷ DTE Comments at 67.

¹⁸ *Id.*

¹⁹ DTE Reply Comments at n. 236. Although the DTE claims it has no record of any CLEC other than ATT requesting carrier-specific reports, WorldCom, Covad and Rhythms all attempted to obtain CLEC-specific Carrier-to-Carrier data in Massachusetts. See Tr. at 5407 (WorldCom (Kinard) cross examination of Verizon (Canny) that CLEC-specific reports from consolidated arbitrations are "not enough."); Supplemental Declaration of Robert Williams in Support of Reply Comments of Rhythms, at 4 (Covad requested CLEC specific reports in an email on July 21, 2000 and an attorney for Rhythms attempted to obtain such reports from Verizon in August.).

²⁰ DTE Reply Comments at 69.

²¹ DTE Reply Comments at 71.

requested due date 97.69%²² of the time is a red herring, and one apparently swallowed gladly by the DTE.²³ Verizon is in fact only reporting on the percentage of time it returned a firm order commitment (FOC) that matched the CLEC's requested due date, or the standard loop interval. A FOC is no more than a promise to deliver a loop on time. The fact that Verizon promised to deliver a loop on time 97.69% is completely irrelevant to the inquiry that the DTE should have undertaken: how often does Verizon *provision* DSL loops on time. That question is answered by PR 3-10: 51% of the time.²⁴

The DTE also makes much of a summary sentence in Covad's FCC comments in which Covad made a simple error. On page 16 of Covad's comments, Covad misstates, in a single sentence, the percentage of nonfunctioning loops delivered by Verizon to Covad. The DTE latches on this sentence and mocks Covad for it throughout its reply comments. The DTE ignores the fact, however, that Covad correctly stated the proposition in the prior sentence, and again in the last sentence of that same paragraph: in other words, twice. Clearly, Covad's statement – highlighted in the paragraph reproduced below – is an error, but that error is minimal given Covad's clear and correct summation of Verizon's statement in the rest of the paragraph.

Covad has two responses. First, Verizon admits that at least 44% of the trouble tickets submitted by Covad to Verizon actually result in trouble found on the loop. **Simply put, at least 44% of the loops Verizon delivered to Covad were non-functioning loops.** That is an incredibly large percentage of non-functioning loops, and the importance of that fact cannot be overstated. This large number of non-functioning loops is not captured in Verizon's on-time performance metrics – meaning that Verizon's on-time performance was significantly lower than the metric would suggest. Simply put, of the 51% of loops that PR 3-10 shows Verizon to have delivered on time, at least 8.5% of those (PR 6-01) were subject to trouble tickets, and at least as to Covad's trouble tickets, at least 44% (Verizon's own statistic) of those loops simply didn't work.

Covad regrets the error in that summary sentence. It is interesting to note that the DTE chose to devote all of its energy to berating Covad for its error, rather than address the merits of Verizon's admission.

Line Sharing: Finally, as to linesharing, the DTE concludes that, because Covad hadn't actually ordered any linesharing UNEs in Massachusetts by June 6, 2000, Verizon was not obligated to meet its linesharing obligations by, for example, completing splitter installation.²⁵ The DTE is woefully misconstruing Verizon's obligation to provide UNEs – it is, of course, not contingent upon whether or not Covad intended to offer linesharing in Massachusetts (which Covad of course did, and is currently doing). Rather, as the

²² See Verizon Guerard/Canny Declaration at Attachment L.

²³ See Letter from Jason Oxman, Senior Government Affairs Counsel, Covad Communications Company, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 00-176 (Nov. 7, 2000).

²⁴ It is important to note that PR-3-10 specifically *excludes* all orders completed late due to any end user or CLEC caused delay and orders that are not complete, such as facilities issues.

²⁵ DTE Reply Comments at 95.

Commission made clear in its linesharing order, Verizon was required, by June 6, 2000, to be operationally ready to provide linesharing UNEs to requesting carriers. As the record in this proceeding clearly demonstrates, Verizon was not ready – and it concedes it was not ready even as of the time it filed the instant application.²⁶

In sum, Covad and Rhythms understand that the task of the DTE is to defend its decision to support Verizon's FCC application. The parties respectfully suggest, however, that the DTE devoted most of its energy in its reply comments to denigrating the efforts of Covad and Rhythms to secure their respective ability to offer the consumers of Massachusetts a competitive alternative to Verizon. Rather than ensuring that Verizon satisfied its burden to prove compliance with the competitive checklist, the DTE has chosen to focus on the shortcomings in Covad and Rhythms' discharge of a burden that is not, and has never been, placed on commenting parties in such proceedings. It is the parties' hope that this Commission will ignore such rhetoric and focus on the substantive facts of Verizon's failure to comply with its DSL obligations in Massachusetts.

Respectfully submitted,

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²⁶ Lacouture/Ruesterholz Declaration at 127 (conceding that Verizon had only finished installing 70% of the splitters necessary for Covad to provision linesharing as of the date Verizon filed its FCC application).

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